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No. 85-637

In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
APPELLANT

v.

MARY IRVING, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

1. Whether Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, which provides that certain de minimis undivided fractional interests held by individual Indians in trust or restricted allotments shall not descend by intestacy or devise, but instead shall escheat to the tribe concerned, results in a taking of private property without the payment of just compensation, in violation of the Fifth Amendment to the Constitution.

2. Whether the court of appeals erred in holding that the amended version of Section 207 of the Indian Land Consolidation Act that was enacted in 1984, 25 U.S.C. (Supp. II) 2206, also is unconstitutional, even though the amended version does not apply to any of the interests in allotments that were owned by appellees' decedents.

PARTIES TO THE PROCEEDING

The appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross (J.A. 11). The appellees sought to represent a class of all heirs and potential heirs of persons dying possessed of lands subject to escheat under Section 207 of the Indian Land Consolidation Act of 1983 (J.A. 11-12). However, the district court sustained the constitutionality of Section 207 without passing on the motion for class certification, and it accordingly denied the motion for class certification as moot (J.S. App. 26a).

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BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-17a) is reported at 758 F.2d 1260. The opinion of the district court (J.S. App. 21a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 18a) was entered on March 29, 1985, and the petition for rehearing was denied on June 6, 1985 (J.S. App. 19a). The notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on July 2, 1985 (J.S. App. 20a). By order dated August 29, 1985, Justice Blackmun extended the time within which to docket the appeal to and including October 15, 1985, and the jurisdictional statement was filed on that date. Probable jurisdiction was noted on January 13, 1986

(J.A. 40). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution; Section 207 of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2519, 25 U.S.C. 2206; the amended version of Section 207 of the Indian Land Consolidation Act enacted in Pub. L. No. 98-608, 98 Stat. 3173, 25 U.S.C. (Supp. II) 2206; and Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891, are reproduced at App., *infra*, 1a-3a.

STATEMENT

This case concerns the constitutionality of Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. (Supp. II) 2206, which was enacted to address the numerous problems created by the increasingly fractionated ownership of Indian allotments. Section 207 provides for the escheat to the tribe concerned of certain de minimis undivided fractional interests in allotments upon the death of the owner of such an interest. The court of appeals held that Section 207, both as enacted in 1983 and as amended in 1984, results in a taking of private property without payment of just compensation, in violation of the Fifth Amendment to the Constitution.

A. Historical Background

1. The allotment policy commenced on a broad scale with the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, which was followed by a number of statutes providing for the allotment of land on individual Indian reservations. See *Solem* v. *Bartlett*, 465 U.S. 463, 466-468 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The particular statute involved here, the Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, provided for the division of the Great Reservation of the Sioux

Nation into separate reservations and the allotment of land on those reservations to individual Indians.

Under the allotment Acts, each member of the tribe typically received a parcel of 160, 80, or 40 acres, depending upon his marital status and age and the type of land involved. The remaining reservation land was to be opened for settlement by non-Indians. General Allotment Act, § 1, 24 Stat. 388. This pattern was followed in the Sioux statute. § 8, 25 Stat. 890. In order to protect the allottees against improvident alienation of their land and to preserve for a generation its tax-exempt status, Section 5 of the General Allotment Act and Section 11 of the Sioux allotment statute provided that an allotted parcel was to be held in trust by the United States for a period of 25 years or such further period as the President might prescribe. 24 Stat. 389; 25 Stat. 891. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980).

The allotment policy ultimately was repudiated by Congress in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976); *Mattz* v. *Arnett*, 412 U.S. at 496 n.18. In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the trust or restricted period of then-existing allotments (§ 2, 25 U.S.C. 462), and provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)).

2. The length of the period during which allotments were to be held in trust made it necessary for Congress to provide for the disposition of an allotted parcel upon the death of the original allottee. Accordingly, Section 5 of the General Allotment Act and Section 11 of the Sioux allotment statute provided that, if the original allottee should die, the land would continue to be held in trust for "his heirs according to the laws of the State or Territory where such land is located" (24 Stat. 389,

25 U.S.C. 348; 25 Stat. 891). These statutory provisions had the effect, insofar as allotted lands were concerned, of preempting the inherent right of an Indian tribe to regulate the descent and distribution of the property of its members. *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899). See F. Cohen, *Handbook of Federal Indian Law* 139 (1942).

In Section 1 of the Act of June 25, 1910, ch. 431, 36 Stat. 855, Congress directed the Secretary of the Interior to ascertain the heirs of a person for whom an allotment was held in trust and who died without making a will disposing of the allotment.[1] In Section 2 of the same Act (36 Stat. 856), Congress also authorized any person age 21 or older who had an interest in a trust or restricted allotment to dispose of that interest by will, in accordance with regulations prescribed by the Secretary of the Interior. *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970); *Blanset* v. *Cardin*, 256 U.S. 319, 325-327 (1921).[2] These statutory provisions remain in effect. See 25 U.S.C. 372, 373. As a matter of practice under them, when the original allottee died, each of his heirs or devisees received an undivided fractional interest in the whole allotment. Each such fractional interest in turn was further

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[1] Congress further provided that if the Secretary determined that the heirs of the decedent were competent to manage their own affairs, he was to issue them a fee patent to the allotment; if he decided that one or more of the heirs was incompetent, he was authorized to cause the allotted lands to be sold or partitioned, with the proceeds or land transferred to competent heirs and held in trust for incompetent heirs. Similar provisions had been enacted in the Act of May 8, 1906, ch. 2348, 34 Stat. 182 *et seq.*, and Section 1 of the Act of May 29, 1908, ch. 216, 35 Stat. 444.

[2] Section 2 of the 1910 Act was amended by the Act of Feb. 14, 1913, ch. 55, 37 Stat. 678 *et seq.*, to apply to restricted property other than allotted lands. *Tooahnippah* v. *Hickel*, 397 U.S. at 606. The right to dispose of property by will previously had been granted to members of the Five Civilized Tribes by the Act of Apr. 26, 1906, ch. 1876, § 23, 34 Stat. 145. See *Blundell* v. *Wallace*, 267 U.S. 373 (1925).

subdivided upon the death of the heir or devisee who owned it. As a result, after several generations, ownership of individual allotments often became extremely fragmented.

The problems associated with this trend toward fractionated ownership were explored at least as early as 1928, in the Meriam Report,[3] and in 1942 by Felix Cohen, in his *Handbook of Federal Indian Law*, *supra*, at 229-230. Congress also was aware when it enacted the IRA in 1934 that the multiplication of the heirs of deceased allottees frequently had caused ownership of allotted lands to become so subdivided that their use by Indians or their rental to non-Indians had been rendered impossible. S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Such lands were often sold to the highest bidder, "practically always to whites" (*ibid.*), with the result that much of the land necessary to support the Indians had passed out of Indian ownerhip. See 78 Cong. Rec. 11727-11728 (1934) (remarks of Rep. Howard). The allotment system thus was bringing about a "complete economic disintegration" on reservations (*ibid.*). Even where allotments in heirship status were not sold, the cost of administering the allotted lands on behalf of numerous individual heirs often was far out of proportion to the income generated by the land.[4]

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[3] L. Meriam, Institute for Government Research, *The Problem of Indian Administration* 40-41 (1928).

[4] Representative Howard, one of the sponsors of the IRA, explained (78 Cong. Rec. 11728 (1934)):

> It is in the case of the inherited allotments, however, that the administrative costs become incredible. * * * On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in

The IRA addressed certain of these problems created by the allotment system. As mentioned above, Section 1 of the IRA prohibited further allotments of reservation land. Moreover, in Section 4 of the IRA, 25 U.S.C. 464, Congress confined the descent or devise of restricted lands to the tribe itself, members of the tribe, heirs or lineal descendants of the decedent,[5] and other Indians for whom the United States may hold land in trust. This provision was intended to "make[] a beginning in the solution of the inherited-land problem." H.R. Rep. 1804, 73d Cong., 2d Sess. 6 (1934).[6]

Thereafter, by the Act of Nov. 24, 1942, ch. 640, 56 Stat. 1021 *et seq.*, Congress provided that if an Indian holder of trust or restricted lands or an interest therein has died intestate without heirs, the lands or interest, together with accumulated rents, issues or profits, "shall escheat to the tribe owning the land at the time of allotment" or to a successor tribe. 25 U.S.C. 373a. See H.R. Rep. 523, 77th Cong., 1st Sess. (1941); S. Rep. 1355, 77th Cong., 2d Sess. (1942).

Although the statutory measures just discussed served to stem the passage into non-Indian hands of Indian allotments that were held in heirship status, they did not

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which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.

[5] See 54 Interior Dec. 584 (1934).

[6] As introduced, the IRA bill provided that interests in allotted lands could not pass by intestacy or devise but instead would pass to the tribe concerned. Under this proposal, an individual otherwise entitled to the land would have acquired a contingent interest, which would vest in him only if the land were found by the Secretary to lie outside an area classified for land consolidation. If the contingent interest did not vest, the individual would have received a certificate reflecting a proportionate interest in tribal lands. H.R. 7902, 73d Cong., 2d Sess. § 11 (1934). This provision, which would have transformed all interests (not merely de minimis fractional interests) in allotted lands into tribal property, was not enacted. See 78 Cong. Rec. 12164-12165 (1934).

address the substantial problems resulting from fractionated ownership of allotments that remained in trust or restricted status. Comprehensive studies of these problems were conducted in 1960 by the responsible committees in both the House and Senate.[7] See generally S. Rep. 98-632, 98th Cong., 2d Sess. 3 (1984); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 712-719 (1971) [hereinafter cited as *Too Little Land*]. By 1960, one-half of the approximately 12 million acres of trust or restricted allotments was held by more than one heir, and one-half of that total in turn was held by more than six heirs. There were numerous examples in which 20 or 30 heirs held undivided interests in a single tract, and instances of more than 100 co-owners were not unheard of. See S. Rep. 98-632, *supra*, at 3; *Too Little Land* 712; *Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 13-14 (1966) [hereinafter cited as *1966 Hearings*].[8]

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[7] Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960); House Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960).

[8] A number of bills were introduced in the 1950s and 1960s to address the fractionated ownership problem in a comprehensive manner, but none was enacted. See, *e.g.*, S. 2397, 85th Cong., 1st Sess. (1957); H.R. 5676, H.R. 6569, H.R. 8077, S. 1392, 87th Cong., 1st Sess. (1961); S. 2899, 87th Cong., 2d Sess. (1962); H.R. 5464, S. 1049, 88th Cong., 1st Sess. (1963); H.R. 11113, 89th Cong., 1st Sess. (1965); H.R. 10560, 90th Cong., 1st Sess. (1967); S. 522, 91st Cong., 1st Sess. (1969).

Statutes were enacted over the years to address land ownership problems on particular reservations, typically for the purpose of limiting the descent of property to members of the tribe. See, *e.g.*, Act of Feb. 27, 1925, ch. 359, § 7, 43 Stat. 1011, 25 U.S.C. 331 note (Osage Indians); Act of Aug. 9, 1946, ch. 933, § 7, 60 Stat. 969 (Yakima Tribe); Act of Aug. 10, 1972, Pub. L. No. 92-377, 86 Stat. 530 *et seq.* (Warm Springs Tribe); Act of Sept. 29, 1972, Pub. L.

In 1984, the Senate Select Committee on Indian Affairs identified the following consequences of the fractionated land ownership pattern (S. Rep. 98-632, *supra*, at 3):

> (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA [Bureau of Indian Affairs] because [of] the inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indians or non-member Indians, (6) inability to control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons ow[n]ing any undivided interest in property.

In addition, allotments owned by numerous heirs often cannot be put to their most economic use, and some tracts are left in a state of quasi-abandonment because of difficulties experienced by the BIA in obtaining agreement of the owners to lease the land. H.R. Rep. 97-908, 97th Cong., 2d Sess. 10-11, 13 (1982).

By the same token, from the BIA's perspective, the fractionated ownership creates substantial administrative problems by increasing the number of recordings required to maintain official land records, the number of probate proceedings to be examined in determining current title status, and the amount of work involved in responding to inquiries concerning family histories in connection with the ownership of undivided interests.

No. 92-443, 86 Stat. 744 *et seq.* (Nez Perce Tribe); Act of Apr. 18, 1978, Pub. L. No. 95-264, 92 Stat. 202, 25 U.S.C. 463d note (Umatilla Reservation); Act of June 17, 1980, Pub. L. No. 96-274, 94 Stat. 537 *et seq.* (Standing Rock Sioux Reservation). Section 7 of the Yakima legislation, 25 U.S.C. 607, was the heirship provision upheld in *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966).

S. Rep. 98-632, *supra*, at 3. The computation of large common fractions for determining the ownership of undivided interests also has become far more complicated. *Ibid.* Indeed, the cost of maintaining such records often far exceeds the income realized from the fractional interest. See F. Cohen, *supra*, at 229; *1966 Hearings* 12-16; *Too Little Land* 718 n.42; *To Amend the Indian Land Consolidation Act of 1983: Hearing on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 6-8 (1984) [hereinafter cited as *1984 Hearing*]; M. Lawson, *Heirship: The Indian Amoeba* (1982), *reprinted in Hearing on S. 2480 and S. 2663 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 76-104 (1984).

B. The Statutory Scheme

1. Congress enacted Section 207 of the Indian Land Consolidation Act of 1983 to address the problems that are created by this increasingly fractionated ownership of allotments in heirship status. As originally enacted, Section 207 provided that an undivided interest in trust or restricted land within a tribe's reservation or subject to its jurisdiction that represents 2% or less of the total acreage of the tract and has earned its owner less than $100 in the preceding year shall not descend by intestacy or devise, but instead shall escheat to the tribe. 25 U.S.C. 2206. This provision addresses the extremes of the problem by preventing the descent (and the resulting further fractionation of ownership) of interests in an allotment that already are "so small as to be financially meaningless" (H.R. Rep. 97-908, *supra*, at 11).

Section 207 does not, however, affect the rights of the owner of such an interest, during his lifetime, to receive his share of the income from the property or to exercise any other incidents of ownership, such as the right to use the land in a manner consistent with the rights of other owners of undivided interests in the tract. In addition, the Secretary's instructions concerning the implementation of Section 207 (see J.S. App. 37a-40a) make

clear that the owner of a de minimis interest may avoid escheat by purchasing sufficient additional interests in the allotment from other co-owners so that his ownership share in the overall tract will exceed the 2% (or $100) level that avoids escheat (see 25 C.F.R. 151.7) or by conveying his interest to co-owners or to his relatives pursuant to 25 C.F.R. 152.25, perhaps reserving a life estate for himself.[9] A further option, if feasible, would be for the owner to apply to the Secretary for a partition of the tract to increase his ownership share. See 25 C.F.R. 152.33. See J.S. App. 39a-40a.

2. In October 1984, Congress revised Section 207 to provide still further alternatives to escheat. See Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*; J.S. App. 32a-36a.

First, Congress relaxed the standards that trigger automatic escheat under the statute. Instead of looking only to the income received in the year prior to the owner's death, as under the original version, the amended version of Section 207 provides: (i) that an interest in an allotment will escheat to the tribe if it represents 2% or less of the total acreage and is incapable of earning $100 in any one of the five years *after* the decedent's death, and (ii) that the failure of the interest to earn the decedent at least $100 in any one of the five years prior to his death gives rise only to a rebuttable presumption that it is incapable of earning $100 in any one of the five years after his death.[10] These changes were intended to account for the possibility that the income in

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[9] Of course, if the transferee's total interests in the tract do not satisfy the 2% or $100 test upon *his* death, the transferee's interest will escheat to the tribe pursuant to 25 U.S.C. 2206, unless he takes similar measures to avoid escheat.

[10] Read literally, this provision would seem to require an interest to earn a minimum of $100 in all five of the years preceding the death of the allottee. However, the congressional intent was only to require that the interest earn $100 in at least one of the preceding five years. See 130 Cong. Rec. E4408 (daily ed. Oct. 10, 1984) (remarks of Rep. Udall). We have been informed by the Department of the Interior that it has implemented the amended version of Section 207 in conformity with this congressional intent.

the year immediately prior to the owner's death might have been abnormally low or that the receipt of little or no income did not accurately reflect the true value of the interest because the parcel contained valuable mineral or timber resources that were not exploited during the period in which income was measured. S. Rep. 98-632, *supra*, at 7, 12; *1984 Hearing* 8, 17, 20, 26, 32, 33, 74-78; *Amendments to the Indian Land Consolidated Act: Hearing on H.R.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 8, 29, 31, 37 (1983) [hereinafter cited as *1983 Hearing*].

Second, a new Subsection (b) provides that Section 207 does not prohibit the owner of an otherwise escheatable interest from devising it to the owner of another fractional interest in the same tract. This exception serves the statutory goal of consolidating fractional interests, while at the same time permitting the owner of such an interest to ensure that it will remain in individual rather than tribal ownership after his death. S. Rep. 98-632, *supra*, at 12.

Third, a new Subsection (c) permits a tribe, with the approval of the Secretary, to adopt its own code to govern the disposition of interests that otherwise would be subject to escheat under Section 207, so long as the code accomplishes the statutory purpose of preventing further descent or fractionation of escheatable interests. Such a tribal code might provide, for example, that an otherwise escheatable interest shall descend by intestacy to another owner of a fractional interest in the same tract.[11]

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[11] Other provisions of the Indian Land Consolidation Act address related land ownership problems on Indian reservations. For example, Section 203 of the Act, 25 U.S.C. 2202, extends Section 5 of the IRA, 25 U.S.C. 465, to non-IRA tribes, thereby empowering the Secretary to consolidate tribal or individual landholdings by means of the purchase, relinquishment, gift, exchange, or assignment of interests in land.

The Act also contains three sections that grant new powers to the tribes themselves, subject to Secretarial oversight. Under

C. The Proceedings In this Case

1. a. Appellees filed this suit on October 20, 1983, in the United States District Court for the District of South Dakota (J.A. 5). They challenged the constitutionality of Section 207 of the Indian Land Consolidation Act on the ground that it resulted in a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution. The named plaintiffs, appellees herein, were Mary Irving, Patrick Pumpkin Seed, and Elaine Bissonette, as guardian for five minor children of Geraldine Poor Bear Cross. The named plaintiffs alleged that they are the potential heirs or devisees of parents (or, in one instance, an uncle) who died possessed of interests in tracts on the Pine Ridge Reservation or Rosebud Reservation that were subject to escheat under Section 207.[12] The four decedents collec-

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Section 204, 25 U.S.C. (Supp. II) 2203, a tribe is authorized to adopt a land consolidation program for the elimination of the checkerboard pattern of tribal lands and tribal ownership of fractional interests in reservation lands; the Secretary thereafter must approve any land transactions that are consistent with the tribe's plan. Section 205, 25 U.S.C. (Supp. II) 2204, authorizes a tribe to purchase (at fair market value and subject to certain exceptions) all of the interests in a tract of reservation land with the consent of the owners of more than 50% of the total interests in that tract. Finally, in order to stem the passage of previously allotted land into non-land ownership, Section 206 of the Act, 25 U.S.C. (Supp. II) 2205, permits a tribe, with the approval of the Secretary, to adopt an ordinance providing that non-members of the tribe or non-Indians shall not be permitted to receive an interest in trust or restricted lands by devise or descent, subject to special protections for non-member or non-Indian spouses or children. (The foregoing description of Sections 204, 205 and 206 reflects the 1984 amendments to those Sections made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*)

[12] The named plaintiffs sought to represent a class of all heirs and potential heirs of persons who died possessed of lands subject to escheat pursuant to Section 207 (J.A. 11-12). However, the district court entered judgment for the Secretary before it ruled on the named plaintiffs' motion for class certification, and the district

tively owned, at the time of their deaths, 65 interests in restricted or trust allotments (J.A. 18-39). According to the inventory of trust lands prepared by the Bureau of Indian Affairs for each decedent (J.A. 20, 22-28, 32-33, 37-39), 41 of those interests were so minimal as to be subject to Section 207.[13] One of the decedents, Geraldine Poor Bear Cross, owned 26 interests that were subject to escheat because they represented 2% or less of the total value of the tract in question and earned her less than $100 in the year prior to her death; thirteen of those 26 interests earned less than $1.00 and 19 earned less than $8.00 in the year prior to her death (J.A. 22-28). The smallest of the 26 was a 1/3645th undivided interest in 320.12 acres (.0002743484), which earned 35 cents in the previous year (J.A. 28). The escheated interests of the other decedents were comparably insubstantial (J.A. 20, 32-33, 37-39).

b. The district court held that Section 207 of the Act does not violate the Just Compensation Clause of the Fifth Amendment (J.S. App. 21a-26a). The district court reasoned that rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation; that nothing in the Constitution prohibits a legislature from limiting, conditioning, or even abolishing the power of testamentary disposition; and that an expectation of succession to the property of a living person, whether by intestacy or devise, does not vest until the death of that person (J.S. App. 22a-23a).

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court therefore denied the motion for class certification as moot (J.S. App. 26a).

[13] It appears from the record that, in the instance of the decedent Edgar Pumpkin Seed, the BIA erroneously subjected one allotment interest to escheat under Section 207 when in fact it constituted a 1/6 interest and therefore more than 2% of the total tract (J.A. 33). In the case of the decedent Charles Pumpkin Seed, it appears that the BIA erroneously excluded from escheat under Section 207 an interest that represented less than 2% of the total tract (.0104166) and that earned only $6.75 the previous year (J.A. 36).

Accordingly, the district court held that until the time of the death of their parents or uncle, appellees had only a mere expectancy of heirship that was subject to being altered by Congress at any time. For this reason, in the court's view, appellees had no vested property rights, and Section 207 did not result in a taking of their property for purposes of the Fifth Amendment. J.S. App. 23a-25a. The district court also held that under the applicable standard of review enunciated by this Court in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977), Congress's treatment of the decedent Indian owners' undivided fractional interests was tied rationally to the fulfillment of Congress's unique obligation to the Indians. J.S. App. 24a-25a n.1.

2. The court of appeals reversed, holding that Section 207 is unconstitutional (J.S. App. 1a-17a).

a. The court of appeals first acknowledged that "Congress may alter and condition rights that have not yet vested in individual Indians" (J.S. App. 3a-4a, citing *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976), and *United States* v. *Jim*, 409 U.S. 80 (1972)) and that "the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause" (J.S. App. 4a (footnote omitted)). The court therefore held that the interference with any expectancy of heirship appellees might have had did not result in a taking of vested property rights (*ibid.*).

The court also rejected two theories by which appellees' contended that they had acquired such vested rights. First, the court found "disingenuous and excessively technical" (J.S. App. 5a) appellees' contention that Congress's use of the word "escheat" indicated an intent to affect only property of a decedent who died intestate without heirs, and therefore not to affect property rights that appellees asserted they inherited instantaneously upon the death of the respective decedents (*id.* at 5a-7a). In the court of appeals' view, the "sensible reading

of [Section 207] is that Congress, exercising its power as sovereign to control disposition of property at death, declared a limited class of property rights incapable of so passing" (*id.* at 5a (footnote omitted)). In these circumstances, the court reasoned, Congress's use of the term "escheat" is consistent with the established definition of that term to mean " '[a] reversion of property to the state in consequence of a want of any individual *competent to inherit*' " (*id.* at 6a, quoting *Black's Law Dictionary* 488 (5th ed. 1979) (emphasis supplied by the court)).

The court of appeals likewise rejected the notion that appellees gained some sort of vested interest by virtue of the manner in which the United States originally allotted the lands in question to individual Indians (J.S. App. 7a-11a). Appellees relied on the language in the Sioux allotment statute that provided that the land would be held in trust for the allottee or, in the case of his decease, for "his heirs according to the law of the State or Territory where such land is located" (*id.* at 8a, quoting Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 891). However, in the court of appeals' view, this language was intended only to ensure that the trust status would continue beyond the death of the original allottee, not to grant a vested future interest in the immediate heirs of the original allottee and subsequent generations of his descendants (J.S. App. 8a-9a). The court observed that to find such a vested future interest in the heirs would be inconsistent with the provision in the Sioux statute itself for state law to govern the descent of an allotment by intestacy, since state law might be amended to alter the categories or order of succession of eligible heirs. The court also found appellees' assertion of a vested right of inheritance in descendants of the original allottee to be inconsistent with Congress's subsequent authorization for the owner of a trust or restricted allotment to devise the property to persons other than his heirs at law (*id.*

at 9a-10a, citing 25 U.S.C. 373, 464). Finally, the court reasoned that recognition of such a right under the Sioux allotment statute would be inconsistent with the purpose of the allotment acts to convert Indian lands to the American system of individualized rather than tribal ownership (J.S. App. 10a-11a).

b. Although the court of appeals held that Section 207 does not interfere with any vested rights of the *appellees*, the court nevertheless held that it does interfere with what the court of appeals found to be a vested right in the *original allottee and his successors* to pass the lands upon death (J.S. App. 15a-17a). The court so held even though it acknowledged that appellees had not directly rested their argument on any distinct right of their decedents (*id.* at 12a-13a n.11).

In the court of appeals' view, the Sioux allotment statute was in the nature of a bargain, under which the allottees received, inter alia, the right to control the disposition of their property at death in return for relinquishing their claims to tribal lands (J.S. App. 16a). On this premise, the court held that governmental interference with that right would result in a taking of property, just as this Court held in *Choate* v. *Trapp*, 224 U.S. 665 (1912), that Congress's repeal of the tax exemption for an allotment resulted in a taking (J.S. App. 15a-16a). Because Section 207 does not provide for the payment of compensation to the estate of the decedents whose lands are subject to escheat, the court of appeals held that Section 207 violates the Just Compensation Clause of the Fifth Amendment.

c. The property in question escheated prior to the October 1984 amendments to Section 207. As a result none of the named appellees was affected by the amended version of Section 207. Nevertheless, without further discussion or any analysis of the differences between the original and amended versions of Section 207, the court of appeals held that the amended version of Section 207 is unconstitutional as well (J.S. App. 17a).

SUMMARY OF ARGUMENT

I

Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, provides that certain de minimis undivided fractional interests held by individual Indians in trust or restricted allotments shall not descend by intestacy or devise, but instead shall escheat to the tribe. This provision substantially furthers important governmental interests on behalf of Indians and is fully consistent with the Just Compensation Clause of the Fifth Amendment.

A. Although the plenary authority of Congress over the property of individual Indians is subject to constitutional limitations, Section 207 violates no such limitation. Section 207 is rationally tied to the fulfillment of Congress's unique obligation toward the Indians. Moreover, every sovereign possesses the power to regulate the manner and terms upon which property may be transmitted at death, as well as the authority to prescribe who shall and who shall not be capable of taking it. Congress possesses these sovereign powers with respect to property held by the United States in trust for Indians or held by Indians subject to federal restraints on alienation. In the exercise of this authority, Congress on numerous occasions has amended the laws governing the disposition of the property of an Indian upon his death or subjected the distribution of such property to the operation of state or tribal law that is itself subject to change. Section 207 of the Indian Land Consolidation Act is consistent with these enactments.

B. There is no need in this case to consider the outer limits on Congress's authority with respect to the descent and distribution of Indian property, because Section 207 of the Indian Land Consolidation Act constitutes a carefully tailored measure that falls within whatever limits the Fifth Amendment might impose.

1. Congress has not imposed a blanket prohibition against the descent to private individuals of all Indian

property. Section 207 applies only to what Congress reasonably determined to be de minimis interests in trust or restricted allotments; it does not affect more substantial interests in allotments and has no effect whatever on other kinds of property held by Indians. By the same token, where Section 207 does apply, it addresses the problems associated with fractionated ownership where they are present in their most extreme form and brings about consolidation of that ownership either in individual Indians or in the tribe itself. Thus, the marginal limitation on the ability of Indians to dispose of or receive interests in allotments is a reasonable regulatory measure adopted in the interest of the Indians.

2. The conclusion that Section 207 does not violate the Fifth Amendment follows from a consideration of the three factors this Court has identified as particularly significant in determining whether governmental action constitutes a "taking" of property. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

a. First, with respect to the character of the governmental action, it is significant that Congress did not provide that the interests in allotments shall escheat to the United States; they pass to the Indian tribe on whose reservation the allotment is situated or to whose jurisdiction it is subject. Because in most cases the tribe itself was the owner of the land prior to the allotment, the effect of Section 207 is to return the property to the original owner. This effect is consistent with the policies of the Indian Reorganization Act to end the allotment policy, consolidate reservations landholdings, and limit the loss of Indian lands to non-Indian ownership. The retention of the land in Indian ownership also serves to ensure that Section 207 is a reasonable regulatory measure designed to adjust benefits and burdens and promote the general welfare of the reservation. In addition, the devolution to the tribe of an interest in an allotment does not entirely sever the nexus of the tribal

member or his potential heirs to the property. The tribe has a special responsibility for its members, who in turn collectively own a beneficial interest in all tribal property, including property that escheats pursuant to Section 207. Thus, there is a "reciprocity of advantage" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)) among individual tribal members by virtue of the operation of the escheat provision on the reservation.

b. The economic impact of Section 207 is limited because it affects only those interests in allotments that Congress reasonably found to be of a minimal value and to represent an insignificant stake in the allotment. Nor does Section 207 significantly interfere with the decedent's incidents of ownership. The owner of an escheatable interest in an allotment retains his full right to receive income from it or to sell or donate it during his lifetime, and is deprived only of the ability to dispose of the interest in kind upon his death. He may, for example sell his interest and provide for the payment of the proceeds to his heirs or devisees upon his death. Moreover, under the amended version of Section 207, the owner may dispose of the interest even at death, provided that it is devised to another owner of an interest in the same property. In these circumstances, the limitation Section 207 imposes on only one of the incidents of ownership—the ability to have the property descend in kind to a particular heir—does not impermissibly interfere with the owner's property rights viewed in the aggregate. *Andrus* v. *Allard*, 444 U.S. 51 65-66 (1979).

c. Finally, Section 207 does not undermine distinct investment-backed expectations. A potential heir or devisee of property has no legally vested right in that property, and his bare expectancy of receiving it is not protected by the Fifth Amendment. By the same token, the incidents of ownership preserved by Section 207 in the owner of the fractional interest fully satisfy any reasonable investment-backed expectations that he may

have had. Indeed, the interest almost invariably passed to the owner by inheritance or devise, and it is unlikely that he would have made any investment in the property in anticipation of passing that interest upon his death. Moreover, the interests affected are held subject to restrictions on alienation, and Congress retains the right to alter those restrictions and the rules governing the distribution of the property at death. These circumstances further undermine any expectation of an unqualified right to dispose of de minimis interests at death.

C. The court of appeals did not disagree with the foregoing principles as a general matter. However, it held that although appellees had no vested rights that were affected by Section 207, the decedent owners of the interests in the allotments had a vested right to control the disposition of those interests at death. The court of appeals erred in construing the Sioux allotment statute as a form of contract in which Congress conferred such a right on the original allottees and each generation of their heirs to be exempt from whatever amendments Congress might adopt to govern the descent and distribution of Indian property.

Section 11 of the Sioux allotment statute provides that an allotment will be held in trust for the allottee or, upon his death, for "his heirs according to the laws of the State or Territory where such land is located" (25 Stat. 891). Thus, Section 11 provides for the disposition of allotments to be governed not by the allottee's own preferences, but by state law that was itself subject to change. It was not until the Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373 *et seq.*, that the Sioux Indians and other allottees were granted the right to devise restricted property by will, and thereby to control its disposition.

Moreover, this Court has repeatedly held that absent some clear indication that the legislature intends to bind

itself contractually, a law is presumed not to create private contractual or vested rights, but merely to declare a policy to be pursued until the legislature shall ordain otherwise. The Court applied this principle in the very context of Indian allotments in *Jefferson* v. *Fink*, 247 U.S. 288, 293-294 (1918). There, the Court held that Congress, by specifying that the descent of allotments would be governed by a particular law, did not create a contractual right to have that law applied, and that Congress therefore remained free to amend the allotment statute to provide for another disposition of the property. There is no reason to believe that Congress intended a different result under Section 11 of the Sioux allotment statute.

Nor does the explanation of the Sioux allotment statute to the Indians support the view that the Sioux, unlike all other Indians affected by the allotment policy, bargained for and obtained a vested right on behalf of the original allottees and their descendants to control the disposition of their allotments at death. The report of the Commission that met with the Sioux reflects an understanding on the part of the Indians that, if they elected to take land by allotment, the land would be held in trust for 25 years and that thereafter they would have absolute fee title in the same manner as the white man. However, neither Section 11 of the Act nor the report of the Commission reflects an understanding that the Indians would be exempt from the power of the sovereign to revise the rules of descent of Indian property, particularly while it remained in trust status. But even if some right to control the disposition of property at death were originally within the contemplation of Congress and the Indians, that right could not have been intended to be both permanent and absolute, even in the face of the drastically changed circumstances that confronted Congress when it enacted Section 207 almost 100 years later.

II

Although all of the interests of the decedents in this case escheated pursuant to the original version of Section 207, the court of appeals invalidated not only the original version of Section 207, but also the amended version that became effective on October 30, 1984. Because there was no case or controversy regarding the application of the amended Section 207 to the parties in this case, the court of appeals had no authority to invalidate that provision. *Williams* v. *Zbaraz*, 448 U.S. 358, 367 (1980).

ARGUMENT

I. SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT OF 1983 DOES NOT RESULT IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT

Congress enacted Section 207 of the Indian Land Consolidation Act of 1983 in order to stem the ever-increasing fractionation of ownership that has inhibited the use and development of allotted lands on Indian reservations and has rendered the administration of Indian lands and estates both complex and unduly expensive. The provision in Section 207 for the "escheat" to the tribe of certain de minimis interests in Indian allotments upon the death of the owner constitutes a reasonable exercise by Congress of the inherent sovereign power, recognized by this Court on numerous occasions, to regulate the descent and distribution of property and to provide for the disposition of property for which there are no heirs who qualify by statute to receive it. This regulatory measure furthers the United States' obligation to the Indians by providing for the gradual elimination of the most extreme aspects of the fractionated ownership problem that has plagued Indian reservations for generations, while at the same time retaining the interests

affected in Indian ownership under the auspices of the tribe concerned.

By the same token, Section 207 has only a minimal impact on private property rights. First, as the court of appeals recognized (J.S. App. 4a, 11a), potential heirs or devisees such as appellees have no vested rights in the receipt of the property of a living person, and appellees acquired no such vested rights under the Sioux allotment act. Second, Section 207 does not substantially interfere with the rights of persons, such as appellees' decedents, who are the owners of de minimis fractional interests in allotments. The owner of such an interest may retain and benefit from it during his lifetime or make an inter vivos transfer of the interest to a relative or to another owner of an interest in the same tract. Moreover, under the amended version of Section 207, the owner likewise may avoid escheat of the interest upon his death by devising it to another owner of an interest in the same allotment.

The court of appeals held, however, that the decedents in this case had vested rights in being able to control the disposition of their interests in allotments at death and that the effect of Section 207 on that right violated the Fifth Amendment (J.S. App. 15a-17a). The court erred. When the Sioux allotment statute was enacted in 1889, an Indian had no right to control the disposition of such property at death; the right to devise a restricted allotment by will was not conferred on Indians until 1910. Nor did the Sioux allotment statute grant the original allottees and their heirs and descendants a contractual or vested right to have their interests in allotments descend in the manner provided under state law as it happened to exist in 1889—a right that would amount to a perpetual exemption from the otherwise recognized power of the sovereign to modify the laws of descent and distribution. What the original allottees received was the right, shared by all property owners, to have their prop-

erty descend in accordance with the laws governing such matters that are in effect at the time of their death. Section 207 was one such law at the time of the death of appellees' decedents.

A. Section 207 Is A Valid Exercise Of Congress's Plenary Power To Regulate The Descent And Distribution Of Interests In Indian Property

This Court repeatedly has recognized that Congress has plenary authority over Indian affairs and property, particularly property held in trust by the United States or subject to the restraints against alienation that long have characterized Indian tenure. See, *e.g.*, *Montana* v. *Blackfeet Tribe*, No. 83-2161 (June 3, 1985), slip op. 4-5; *National Farmers Union Insurance Co.* v. *Crow Tribe*, No. 84-320 (June 3, 1985), slip op. 5; *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 7, 21; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 310-317 (1911); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568 (1903); *United States* v. *Kagama*, 118 U.S. 375, 379-385 (1886). See also *United States* v. *Sioux Nation*, 448 U.S. 371, 408, 414-415 (1980). It necessarily follows that Congress's authority to regulate the disposition of interests in trust or restricted property upon the death of the Indian owner encompasses whatever sovereign powers a State would have over such matters,[14] plus the unique powers of Congress attributable to the special relationship of the United States to the Indians.

Although the plenary power of Congress over the property of Indians is subject to constitutional limita-

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[14] The court of appeals recognized that the powers of Congress over Indians are "similar to the power Congress exercises over the District of Columbia, territories and possessions, and other federal enclaves" (J.S. App. 5a n.4, citing F. Cohen, *Handbook of Federal Indian Law* 219-220 (1982)), and "thus are comparable to those of state governments in their respective realms" (J.S. App. 5a n.4). Compare *Mormon Church* v. *United States*, 136 U.S. 1 (1890).

tions (see, *e.g.*, *United States* v. *Sioux Nation*, 448 U.S. at 415), Section 207 of the Indian Land Consolidation Act of 1983 violates no such limitation. That Section is, beyond question, rationally related to the fulfillment of Congress's unique obligation to the Indians, and it therefore comports with the Due Process Clause of the Fifth Amendment. *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).[15] Nor does Section 207 result in a taking of private property for public use within the meaning of the Fifth Amendment.[16] Rather, Section 207

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[15] The escheat provision is consistent with current federal policies, which began with the IRA and were continued by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*, of strengthening tribal governments, assisting tribes in becoming self-sufficient, and promoting the development of reservation land and resources. See, *e.g.*, *Montana* v. *Blackfeet Tribe*, slip op. 7 n.5; *National Farmers Union Insurance Co.* v. *Crow Tribe*, slip op. 10; *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 & n.17 (1983); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973). The Indian Land Consolidation Act promotes these policies by assisting tribes in establishing an economically viable land base for the tribes and their members. In particular, Section 207 aggregates what would otherwise be de minimis interests from which little or no benefit would accrue if they were retained in separate ownership, and thereby renders such interests capable of generating meaningful revenue or being used for some other purpose that will benefit the tribe and its members.

[16] The legislative history of Section 207 strongly reflects Congress's intention that the Act not result in any cost to the United States. H.R. Rep. 97-908, *supra*, at 11; S. Rep. 98-632, *supra*, at 8; *1984 Hearing* 19, 20, 23, 30-31, 33, 34, 35, 37, 38, 39, 40, 42, 46, 57, 76; *1983 Hearing* 21, 38. Compare 25 U.S.C. (Supp. II) 2205(3). Moreover, the legislative history of the 1984 amendments reflects an awareness of the district court's holding in this case that Section 207 does not result in a taking of vested property rights. S. Rep. 98-632, *supra*, at 5; *1984 Hearing* 26, 76. Against this background, Congress cannot be understood to have intended to make a Tucker Act remedy available against the United States. Compare *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 28-30.

represents "nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal[,] within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 492-493 (1850). The Court long has recognized this sovereign power. See, *e.g.*, *Tooahnippah* v. *Hickel*, 397 U.S. at 609; *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562 (1942); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288-291 (1898); *United States* v. *Perkins*, 163 U.S. 625, 628 (1896); *United States* v. *Fox*, 94 U.S. 315, 320-321 (1876); *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874); *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192, 202 (1825).

This Court's decisions have described the legislature's power with respect to the descent of property in broad language that goes well beyond what is necessary to sustain the Act of Congress at issue here. For example, the Court has stated that statutes permitting the disposition of property by will are enabling acts, and that a person may not devise his property in the absence of such authorization. See, *e.g.*, *Tooahnippah* v. *Hickel*, 397 U.S. at 609; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 289; *United States* v. *Perkins*, 163 U.S. at 627-628; *United States* v. *Fox*, 94 U.S. at 320. Similarly, the Court has stated that where the sovereign has provided for the descent of property to heirs designated by law, the potential heirs do not actually have vested rights, prior to the death of the owner, to receive the property [17];

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[17] Since the decision in *D'Arundel's Case* in 1225 and "throughout the later history of English law, including the times of Coke and of Blackstone, a bare expectancy was regarded as nothing whatever." L. Simes & A. Smith, *The Law of Future Interests* 412 (2d ed. 1956). The basis for the rule that a prospective heir has no interest or vested right in his ancestor's estate is reflected in the Latin maxim " 'Nemo est haeres viventis,' " *i.e.*, no one can be the

accordingly, the laws governing intestate succession may be revised by the legislature, and the revised laws may be applied to particular property without contravening the Fifth Amendment, so long as ownership of the property had not become vested in the heirs under prior law by virtue of the death of the owner. *Irving Trust Co.* v. *Day*, 314 U.S. at 562; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 288; *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) at 148. See generally 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2405, at 199, 201 (1979); *id.* § 2406, at 208-209, 211-212. These views were summarized by the Court in *Irving Trust Co.* v. *Day*, 314 U.S. at 562 (citations omitted):

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufference. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. * * * Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person.

The Court has enunciated these same principles in the context of the descent and distribution of Indian property. Thus, the Court has stated that the right of an Indian to devise property by a will is of statutory creation (*Tooahnippah* v. *Hickel*, 397 U.S. at 609), and that Congress retains the power to amend the statutes governing intestate succession and to apply those amendments to an interest in an allotment that has not already passed to the heirs of the owner (*Jefferson* v. *Fink*, 247 U.S. at 294). See also *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n.11 (E.D. Wash. 1965), aff'd, 384 U.S.

"heir of a living person." 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2410, at 234 (1979).

209 (1966). In fact, Congress on numerous occasions has amended the laws governing the disposition of the property of an Indian upon his death or subjected the distribution of such property to the operation of state or tribal laws or federal regulations, all of which are themselves subject to change. See, *e.g.*, 25 U.S.C. 372, 373, 464, 2205; *Jefferson* v. *Fink*, *supra*; *Simmons* v. *Eagle Seelatsee*, *supra*.[18] Congress also has provided for the escheat to the tribe concerned of interests in allotments held by an Indian who dies intestate without an heir qualified to receive the property. 25 U.S.C. 373a; page 6, *supra*. Section 207 of the Indian Land Consolidation Act of 1983 is but another example of Congress's exercise of this authority.

B. Section 207 Is A Carefully Tailored Regulatory Measure That Does Not Result In A "Taking" Of Private Property Within The Meaning Of The Fifth Amendment

There is no need here to consider the limits of the principles discussed in point A regarding the authority of the legislature over the descent of property, or to consider the application of those principles to a state or federal statute that absolutely barred an individual from devising any of his property by will or that designated

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[18] For example, the decedents in this case were members of the Oglala Sioux Tribe, which is organized pursuant to the IRA. Property subject to Section 4 of the IRA, 25 U.S.C. 464, may only be devised to or inherited by members of the tribe, lineal descendants of the decedent, or other Indians for whom the United States may hold land in trust. See *Cultee* v. *United States*, 713 F.2d 1455, 1457-1460 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984). As a result, at least since 1934, there have been restrictions placed on the devise and descent of property on IRA reservations, and certain classes of persons have been barred from inheriting restricted property. Section 4 of the IRA and Section 207 of the Indian Land Consolidation Act thus share a common purpose: to preserve and consolidate reservation lands in Indian ownership. See 54 Interior Dec. 584, 585-586 (1934).

the government as the heir to all private property. Cf. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 288-289. In enacting Section 207 of the Indian Land Consolidation Act, Congress invoked the doctrine of escheat and declared the tribe to be the ultimate heir with respect to only a narrow category of de minimis interests in property in order to further substantial public purposes on behalf of Indians. As we explain below, this carefully tailored and flexible measure falls well within whatever limits the Fifth Amendment might place on Congress's plenary power over Indian property in this setting.

1. Congress has not imposed a blanket prohibition against the passing of all interests in trust or restricted allotments to private individuals by intestacy or devise. Section 207 applies only to what Congress reasonably determined to be de minimis undivided fractional interests in such allotments: those that represent less than 2% of the tract and that earned the owner less than $100 in the preceding year (or, under the amended version, are incapable of earning $100 annually). More substantial interests may continue to pass to heirs in accordance with state law, as provided by the Sioux allotment statute, or to devisees by will, as provided by 25 U.S.C. 373. And, of course, interests owned by individual Indians in property other than restricted allotted lands are entirely unaffected by Section 207. Thus, as a general matter, Section 207 imposes only a marginal limitation on the ability of Indians to dispose of or receive interests in property.

Moreover, where it does operate, Section 207 serves significant public purposes. As we have explained (see pages 6-9, *supra*), the increasingly fractionated ownership of Indian allotments has greatly complicated the leasing or other use of allotments, often preventing their most economic development; devalued the undivided interests because of the practical difficulties associated with use or sale of the land; greatly attenuated the relationship of the numerous individual owners to the land

itself; and created substantial and costly administrative difficulties for the BIA in administering the land and the estates of deceased Indians. Section 207 is narrowly tailored to address the category of cases in which Congress rationally could determine that these problems are present in their most extreme form because the ownership is the most fractionated. These considerations demonstrate that Section 207 is a reasonable regulatory measure that substantially furthers Congress's responsibilities to the Indians by providing for devolution of fractionated interests to the tribe itself in narrowly limited circumstances. It does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), and therefore does not transgress whatever limitations the Just Compensation Clause of the Fifth Amendment might be thought to place on the power of Congress to specify the distribution of trust or restricted property upon the death of the Indian who is the beneficial owner.

2. The conclusion that Section 207 is not inconsistent with the Just Compensation Clause properly reflects this Court's decision under that Clause. As the Court recently reiterated, its decisions "have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12-13. However, to aid in this determination, the Court has identified three factors that have " 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Id.* at 13, quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Each of these factors weighs against finding that Section 207

results in a taking of property within the meaning of the Fifth Amendment.

a. With respect to the nature of the governmental action, it is significant that Congress did not provide that the de minimis interests involved shall escheat to the United States; they instead pass to the Indian tribe on whose reservation the allotment is situated or to whose jurisdiction it is subject. This factor is important for several reasons. In most cases, the tribe itself was the owner of the land prior to the allotment,[19] and Section 207 has the effect in those circumstances of returning property to the original owner. When Congress formally abandoned the allotment policy in 1934, it sought to return the tribes and their reservations to their prior status to the degree possible by restoring surplus land to tribal ownership, providing for the consolidation of tribal lands, barring further allotments, retaining existing allotments in trust or restricted status, and circumscribing the category of persons to whom restricted lands may descend. See pages 3, 6, *supra*. Section 207 is consistent with and furthers these policies of the IRA that have governed Indian land ownership on reservations for more than 50 years.

The fact that the de minimis interests involved do not pass to the United States also serves to distinguish Section 207 from statutes that constitute a direct interference with the property by the enacting government. Its role instead is to adjust benefits and burdens in order to promote the common good of individual property owners and other persons in the reservation community generally. See *Connolly*, slip op. 13; *Penn Central*, 438 U.S. at 124. The retention of the land in Indian ownership likewise serves to ensure that the regulatory measure is in fur-

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[19] In the present case, the Sioux Nation owned the land prior to enactment of the 1889 Sioux allotment statute, which established separate reservations for the various Sioux tribes and provided for allotment of lands in severalty within each reservation.

therance of the United States' special relationship to the Indians, and not an act of expropriation by the government directed to other ends. Compare *United States* v. *Sioux Nation*, 448 U.S. at 414-417. Thus, although Congress used the word "escheat" in Section 207, that section simply has the effect of designating the tribe concerned as the statutory heir of de minimis interests of which the owner has made no other permissible disposition at the time of his death. And, because the owner of an undivided interest in an allotted parcel almost invariably does not occupy or use the land, but merely receives a share of whatever income it generates as a result of its lease to others, Section 207 does not interfere with such fundamental rights of ownership as the right to exclude others from the premises. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979).

Further, the Indian tribe to which the property passes has a special responsibility for its members and their family and for the land within its jurisdiction. The members in turn have a special bond among themselves through the tribe and collectively own a beneficial interest in tribal property, including property that escheats pursuant to 25 U.S.C. 2206. The escheat to the tribe of a member's de minimis interest in an allotment therefore does not entirely sever the nexus of that member or his heirs to the property. It also is significant that Section 207 applies uniformly to all undivided interests that represent 2% or less of an allotment and do not satisfy the $100 income test. Although the escheat of any particular parcel might adversely affect the deceased owner of that parcel or his potential heirs or devisees, those heirs and devisees, if they retain a nexus to the tribe or the reservation, presumably stand to benefit by the escheat of other interests to the tribe. As a result there is a "reciprocity of advantage" that substantially undermines any taking argument in this setting. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415; *Penn Central*, 438 U.S. at 139-140 (Rehnquist, J., dissenting).

Finally, and in a related vein, the impact of the ability of the owner of a fractional interest in the allotment to pass that interest by intestacy or devise is not the consequence of a regulatory measure undertaken for an unrelated public purpose, such that fairness and justice might suggest that compensation be paid by the public as a whole. The fractionated ownership exemplified by the de minimis interest is itself the cause of the problem that Congress sought to remedy, because such an interest has adverse effects on other owners of the property and on the reservation community as a whole. A legislature has particular authority to address and eliminate such adverse consequences to others in the community. *Penn Central*, 438 U.S. at 125-127. See, *e.g.*, *Connolly*, slip op. 15-16; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). By contrast, consolidation of these interests in the tribe serves to enhance their aggregate value, to the common benefit of all members of the tribe.

b. With regard to the second factor, the economic impast of Section 207 is limited because it applies to an interest that repreensts 2% or less of the value of the allotment and has not earned or is incapable of earning more than $100 annually. Congress reasonably could determine that such an interest is sufficiently de minimis in its relative economic value and reflects a sufficiently insubstantial stake in the allotted parcel as a whole to warrant its devolution to the tribe in lieu of still further fractionation. The circumstances of this case are consistent with this considered judgment by Congress. Of the 41 interests in allotments in this case that escheated to the tribe pursuant to Section 207, 17 earned less than $1.00 in the preceding year, 29 earned less than $5.00, and all but two earned less than $10.00. See page 13 & note 13, *supra*; J.A. 20, 22-28, 32-33, 37-39.

In addition, even as regards such de minimis interests, Section 207 affects only one of the incidents of owner-

ship: the ability to dispose of the property at death. The court of appeals' holding that Section 207 is unconstitutional is based on the erroneous premise that any restriction on that ability necessarily constitutes a taking. This Court, however, has held that

> the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Andrus v. *Allard*, 444 U.S. at 65-66.

In *Allard*, the owner was barred from selling the particular property but could retain, donate, or devise it. The Court held that the restriction on one means of disposing of the property did not constitute a taking. *Id.* at 66-68. Similarly, here, the owner of a de minimis fractional interest in an allotment retains his full enjoyment of all the incidents of ownership but one: the ability to have his interest in the allotment descend by intestacy or devise in the same form in which he held it during his lifetime. Thus, the owner of an interest that is subject to escheat under Section 207 may dispose of that interest during his lifetime by selling it to another owner of an interest in the same parcel, by exchanging it for another interest of equal value, or by donating it to a relative—perhaps retaining a life estate in order to ensure that he will continue to realize whatever benefits accrue from ownership. 25 C.F.R. 152.25.[20] Similarly, the owner may acquire an additional interest in the tract in order to

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[20] One of the decedents, Geraldine Poor Bear Cross, executed a will on March 16, 1983—after Section 207 was enacted—in which she left all her worldly goods to her five minor children. Complaint, Exh. D. That bequest presumably included her interests in allotments, although those interests were not mentioned. Escheat pursuant to Section 207 could have been avoided if Geraldine Poor Bear Cross had made an inter vivos transfer of those interests at the time she executed her will.

bring his total share above the 2% level necessary to avoid escheat. 25 C.F.R. 151.7. And, in appropriate circumstances, he could apply for partition of the parcel in kind. 25 C.F.R. 152.33. Furthermore, under the amended version of Section 207, an owner may dispose of an otherwise escheatable interest by will, provided it is devised to another owner of an interest in the same property. And even under the original version of Section 207, the owner retained the ability to pass the *value* of his interest in the allotment by making an inter vivos sale of his interest and providing for the proceeds of that sale to be paid to his heirs or devisees upon his death. Thus, Section 207 affects only the descent of fractional interests in kind. Accordingly here, as in *Andrus* v. *Allard*, *supra*, the statute does not impermissibly interfere with the incidents of ownership viewed in the aggregate.

c. Finally, Section 207 does not have a significant impact on any distinct investment-backed expectations. As the court of appeals recognized (J.S. App. 3a-5a), a potential heir or devisee of property has no vested right to receive that property. See pages 13-14, 26-27, *supra*. His bare expectancy of doing so is not entitled to Fifth Amendment protection, irrespective of an anticipatory investment he might have made. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980).

Nor does Section 207 undermine any distinct investment-backed expectation of the deceased owner of the affected fractional interest in an allotment. The incidents of ownership that are preserved, which we have just discussed, are themselves adequate to allow a reasonable return on investment in the property (cf. *Penn Central*), if any investment is involved. In most cases, however, the fractional interest was acquired by the owner by intestacy or devise and then was held in trust for him until the time of his death without any commitment whatsoever of his own resources. In light of the insubstantial nature of the interest, the owner's only association with the allotted

parcel during his lifetime would ordinarily have been the receipt of a share of the income it generated. Moreover, even during the decedent's lifetime, the allotment was held subject to restrictions that would have required the consent of the federal government for any alienation. Congress retained the right to alter those restrictions at any time (see *e.g.*, *Tiger* v. *Western Investment Co.*, 221 U.S. at 316) or to alter the rules governing the distribution of the property at death (*Jefferson* v. *Fink*, 247 U.S. at 294). This pervasive regulation further undermined the reasonableness of any expectation appellees' decedents might have harbored that they would have an unqualified right to provide for the disposition of their fractional interests at death in whatever manner they chose. Cf. *Connolly*, slip op. 14-15; *Tooahnippah* v. *Hickel*, 397 U.S. at 612-613 (Harlan, J., concurring).

d. The foregoing factors demonstrate that Section 207 constitutes a reasonable exercise by Congress of the established sovereign power to prescribe reasonable rules for the distribution of property upon the death of the owner and does not, in its general operation, result in a taking of property that would require the payment of just compensation.

C. The Original Sioux Allottees And Their Descendants Did Not Obtain A Unique Vested Right To Control The Distribution Of Their Interests In Allotments At Death, Irrespective Of Any Intervening Amendments By Congress

The court of appeals did not dispute the general principles that control this case, discussed in points A and B, *supra*. In fact, it expressly concurred in the view that potential heirs or devisees ordinarily have no vested interest in the receipt of property of a living person that is protected by the Fifth Amendment against intervening changes in the law of descent and distribution (J.S. App. 4a). The court of appeals also correctly held that the Sioux allotment statute did not confer any such vested

rights on appellees in the circumstances of this case (*id.* at 11a). But although the court appeared to recognize that appellees did not so argue (see *id.* at 12a-13a n. 11), it held that "the *decedents* in this case had vested rights in being able to control the disposition of their property at death" (*id.* at 15a (emphasis added)), and that the effect of Section 207 on that supposed right violated the Fifth Amendment (J.S. App. 16a-17a).

In the court of appeals' view, the provision in the Sioux allotment statute that state law was to govern inheritance reflected a "bargain," under which the individual Sioux allottee (and each of his descendants) obtained a right to dispose of the property at death in return for the allottee's relinquishment of his interest in tribal lands. The court believed that recognition of such a right was supported by the references in the explanation to the Indians of the importance of trust patents under the Sioux allotment statute for purposes of protecting the Indians and their children. Finally, the court of appeals expressed the view that "the power to control such disposition predominantly characterizes the 'white man's ways' which the Indians were to assimilate" (*id.* at 16a). This analysis is seriously flawed.

1. As an initial matter, the court of appeals' notion that the original allottee and his descendants obtained a vested right to control the distribution of the allottee's interest in the allotment at death is refuted by the text of the Sioux statute. Section 11 of that Act provides that the land will be held in trust for the allottee or, upon his death, for "his heirs according to the laws of the State or Territory where such land is located" (25 Stat. 891). The term "heirs" as used in this Section plainly refers to the allottee's heirs under the state law of intestate succession. See F. Cohen, *supra*, at 230-231 (1942). An allottee would have had no power to control the designation of his heirs under state law.

The court of appeals erred in another critical respect in inferring that the power to control the disposition of property at death was a bargained-for right analogous to the right to exemption from state taxation that was at issue in *Choate* v. *Trapp*, 224 U.S. 665 (1912). See J.S. App. 15a-16a.[21] Prior to the Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373, *et seq.*, the Sioux Indians unquestionably did *not* have the power to dispose of a trust or restricted allotment by will. See *Tooahnippah* v. *Hickel*, 397 U.S. at 613 (Harlan, J., concurring); *Blanset* v. *Cardin*, 256 U.S. at 323-327. When the Sioux allotment statute was passed, the General Allotment Act, after which the Sioux statute was patterned, already prohibited the descent of interests in allotments except in accordance with the state or territorial law of intestate succession. By agreeing to a comparable provision in Section 11 of the 1889 Act, the Sioux actually relinquished the control the tribe otherwise possessed over the disposition of its members' property. See *Jones* v. *Meehan*, 175 U.S. at 29, 32. Thus, by consenting to a statute that preempted the tribe's authority, the Sioux accepted the consequence that the descent and distribution of allotted lands on their reservations thereafter would be controlled by laws that were subject to modification either by the legislature of the State or by Congress in the exercise of its superseding prerogatives.

2. In any event, the court of appeals clearly erred in construing the Sioux allotment statute as a form of con-

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[21] The statute at issue in *Choate* incorporated an agreement with the Choctaw and Chickasaw Tribes, which stated that "[a]ll the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent * * *." Act of June 28, 1898, ch. 517, § 29, 30 Stat. 507. The right of the Choctaw and Chickasaw allottees to be exempt from taxation for a specified period thus was expressly conferred by Congress. By contrast, the relevant language in Section 11 of the Sioux allotment statute was not part of a separate agreement with the Sioux, and Section 11 does not expressly confer an exemption from changes in the law of intestate succession.

tract, under which Congress conferred on individual allottees and every succeeding generation of their descendants a permanent and vested right to be exempt from whatever amendments the legislature might adopt to govern the distribution of a decedent's property. This Court has recently reaffirmed that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declare a policy to be pursued until the legislation shall ordain otherwise.'" *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 14, quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). There is no suggestion whatever—much less a "clear indication"—in Section 11 of the Sioux allotment statute that Congress intended to confer on Indian allottees and their descendants a contractual exemption from the operation of amendments to laws governing Indian property.[22]

Moreover, in *Jefferson* v. *Fink*, *supra*, the Court rejected such an argument in the very context of the inheritance of Indian allotments. In that case, an allotment had been issued pursuant to an agreement with the Creek Tribe that was embodied in the Act of June 30, 1902, ch. 1323, 32 Stat. 500 *et seq.* Section 6 of the Act, 32 Stat. 501, provided that the descent of Creek allotments would be governed by the laws of Arkansas. However, by the Act of May 27, 1908, ch. 199, § 9, 35 Stat. 315, Congress provided that the laws of descent and distribution of the newly admitted State of Oklahoma thereafter would apply to the lands allotted to members of the Five Civilized Tribes. The argument was raised in *Jeffer-*

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[22] The State of South Dakota has altered its applicable laws on several occasions subsequent to the enactment of the Sioux Allotment Act in 1889. For example, dower and curtesy were abolished in South Dakota four years after the passage of the 1889 Act. 1893 S.D. Sess. Laws ch. 76, § 1. See also 77 Interior Dec. 268 (1970); 61 Interior Dec. 307 (1954).

son v. *Fink*, *supra*, that Congress, by specifying in the 1902 allotment statute that the descent of allotments would be governed by Arkansas law, had created a vested or contractual right to have that law applied, and that Congress could not later provide for another disposition of the property of a deceased allottee. 247 U.S. at 293-294. The Court, however, rejected this view of the 1902 Act (*id.* at 294):

> What was said about the rules of descent was purely legislative, not contractual; and its presence in the act gave it no effect that it would not have had as a separate enactment. Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner. Not until the ancestor dies is there any vested right in the heir. Cooley's Constitutional Limitations, 7th ed. 512.

In support of this holding, the Court relied in part on the language in Section 5 of the General Allotment Act that provides for an allotment to continue to be held in trust for the original allottee's heirs as defined by state law (247 U.S. at 290). Because the relevant language in Section 11 of the Sioux allotment statute is identical to that in Section 5 of the General Allotment Act, there likewise is no reason to believe that Congress intended when it passed the latter Act to confer on the Sioux allottees a contractual right to be exempt from future statutory changes affecting the distribution of property.[23]

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[23] The Department of the Interior, which is responsible for administering Indian allotment and probate laws, also has rejected the contention that an original allotment secures in the allottee's heirs vested rights that are protected by the Fifth Amendment as against subsequent legislation that alters the rules of descent and distribution. 66 Interior Dec. 361 (1959). The Interior Department's interpretation of the allotment statute is entitled to "great respect." *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976).

3. Nor does the explanation of the Sioux allotment statute to the Indians support the view that the Sioux, unlike other Indians affected by the allotment policy, actually bargained for and obtained from the United States such a vested right. As an initial matter, the relevant language in Section 11 did not originate in the Sioux allotment statute; it was drawn verbatim from Section 5 of the General Allotment Act. Because the latter Act was not the product of negotiations with Indian tribes, and because the application of its allotment provisions was not made contingent upon the agreement of the Indians concerned, there is no basis for construing the pertinent language in Section 11 to contract away Congress's sovereign power to revise the laws governing the descent of Indian property.

The court of appeals relied on selected passages from the report of the Commission sent to the Sioux territory in 1889 to obtain the approval of the Indians to the allotment statute (J.S. App. 11a n.10, 12a, 15a-16a). However, as the court of appeals acknowledged, the references to children and heirs are "relatively sparse" in the nearly 200-page report (*id.* at 12a n.10). In any event, the selected passages upon which the court of appeals relied provide no basis for the notion that the Indians bargained for and obtained a right, not expressed in the Sioux allotment statute itself, to pass property at death free from the effect of reasonable governmental regulation. Cf. *Oregon Fish & Wildlife Dep't* v. *Klamath Tribe*, No. 83-2148 (July 2, 1985), slip op. 19.

The 1889 Allotment Act was the second statute enacted by Congress to provide for the division and opening up of the Great Sioux Reservation. In 1888, another Commission had unsuccessfully attempted to secure the consent of the Sioux to the Act of Apr. 30, 188, ch. 206, 25 Stat. 94 *et seq.* The Indians' rejection of the provisions of the prior Act caused Congress to make several changes in the 1889 Act. The most significant were the

doubling (from 160 to 320 acres) of the amount of land to be allotted to heads of families (§ 8, 25 Stat. 890) and the increase in the price per acre to be charged for lands that were to be made available for settlement by non-Indians.[24] However, the proviso in the 1888 Act regulating the descent and distribution of allotments was not altered, and it reappears in identical form in the 1889 statute. Compare § 11, 25 Stat. 98, with § 11, 25 Stat. 891. This background, together with the absence of any debate over Section 11 in Congress[25] and the lack of any mention of the descent and distribution proviso to Section 11 in the report of the Commission, makes clear that Congress did not intend to confer an unprecedented right to be exempt from the sovereign power to alter the rules of descent and distribution.

Moreover, the Commission repeatedly informed the Indians that it had no power to bargain with them,[26]

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[24] Under the 1888 Act, all land outside the separate diminished reservations was to be made available for sale to settlers at the price of 50 cents per acre. § 21, 25 Stat. 102. The 1888 Act was rejected chiefly because of the objection of the Sioux to that price. S. Exec. Doc. 51, 51st Cong., 1st Sess. 36 (1890). Under the 1889 Act, the land opened for settlement was to be sold at $1.25 per acre for the first three years, 75 cents per acre for the next two years, and 50 cents per acre thereafter. §21, 25 Stat. 896. The points of difference between the two Acts are summarized in the Department of the Interior's Letter of Instructions to the Commission. S. Exec. Doc. 51, *supra*, at 37-39.

[25] See H.R. Rep. 3645, 50th Cong., 2d Sess. (1889); 20 Cong. Rec. 1492-1496, 1578-1586, 1903-1904, 2283-2284, 2476, 2498 (1889).

[26] See S. Exec. Doc. 51, *supra*, at 45. ("This act you must accept as a whole. We have no power to treat with you."); *id.* at 60 ("We have no authority to change it."); *id.* at 141 ("We have no power to add one word or take one thing from what the Great Father offers you in this bill."); *id.* at 153 ("We have no power to change the law. It will be your duty to accept it or reject it as it is."); *id.* at 190 ("We have no power to change this law.").

thereby underscoring that they could not confer any such special exemption that was not embodied in the Act itself. During the Commission's travels, the Indians were informed that if they elected under Section 11 to take lands by allotment, the lands would be held in trust for twenty-five years so "you cannot be traded or cheated out of it, so that it will remain for you and your children and your children's children" (S. Exec. Doc. 51, 51st Cong., 2d Sess. 73 (1890)). However, this and similar statements (see J.S. App. 11a-12a n.10) simply reflected the overriding purpose of the Act, as explained to the Sioux, of advancing the Indians "as rapidly as possible in the ways of the white man" (S. Exec. Doc. 51, *supra*, at 157). Thus, at the expiration of the trust period, the Indians who took land by allotment were to receive the absolute fee title to the land, "the same as the white man has for his lands" (*id.* at 190). Thereafter, the property was to be treated the same as property owned by non-Indians (*id.* at 46, 157, 159-160). See § 11, 25 Stat. 891. In fact, the court of appeals acknowledged that "[t]he general emphasis [of the Commission's meetings] was that conversion to 'white man's ways' and system of individual ownership * * * would promote the best life and the best future for the Indians' children, not that the treaty [*sic*] would vest specific rights to Indian lands in heirs in perpetuity" (J.S. App. 12a n.10). Yet the effect of the decision below is to *exempt* Indians possessing fractional interests from the otherwise unquestioned power of the sovereign to enact laws modifying the right to transmit property—a power to which the "white man" concededly was subject.

4. Finally, even if some right to pass an interest in an allotment at death was originally contemplated when the Sioux allotment statute was enacted almost 100 years ago, that right cannot be thought to have been of permanent effect (compare *Choate* v. *Trapp*, 224 U.S. 665, 677 (1912)) and to vest absolutely in each succeeding gen-

eration of the allottee's descendants. The Sioux allotment statute was passed against the background of an expectation that allotments would be free of all federal restrictions on alienation within a generation or two. For this reason, the reference in Section 11 to the descent of an allotment while it was still in trust status no doubt had reference principally to a parcel that was owned solely by the original allottee or several of his immediate heirs. When it enacted this provision, Congress obviously did not anticipate the events that have intervened since 1889, including the repudiation of the allotment policy, the indefinite extension of restrictions on the alienation of allotted lands, and the pressing problems occasioned by the ever-increasing fragmentation of ownership. Section 11 of the Sioux allotment statute therefore cannot be read to have disabled Congress from addressing these changed circumstances by invoking the reserved sovereign power to adopt reasonable rules, such as those in Section 207, that affect the descent and distribution of allotted lands.

It is significant in this regard that Section 207 does not affect the descent of substantial interests in allotted parcels that most closely resemble the interests that presumably were within the contemplation of Congress and the Indians in 1889, when ownership of any given allotment was expected to be vested in the allottee himself or divided among relatively few heirs. Rather, Section 207 affects only interests that do not represent any significant stake in the allotment and that actually frustrate the fulfillment of the goals of the allotment policy that Section 11 was intended to implement. Section 11 of the Sioux allotment statute should not be read to preclude Congress from taking appropriate steps to mitigate those unanticipated consequences. *Cf. Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE AMENDED VERSION OF SECTION 207 ALSO IS UNCONSTITUTIONAL, BECAUSE THAT VERSION DOES NOT APPLY TO ANY OF THE INTERESTS IN ALLOTMENTS OWNED BY APPELLEES' DECEDENTS

The court of appeals invalidated not only the original version of Section 207, but also the amended version that became effective on October 30, 1984. J.S. App. 17a.[27] The court did so even though all of the interests of the decedents in this case escheated pursuant to the original version of Section 207 (see J.S. App. 3a). And the court also did so without discussing any features of the latter provision—such as the new Subsection (b), which permits the owner of an otherwise escheatable interest to devise it to another owner of an interest in the same tract—that even more clearly establish that Section 207 does not impermissibly interfere with a supposed right to dispose of property at death.[28] Because there was no case or controversy regarding the application of the amended Section 207 to the parties before the court of appeals, the court had no authority to invalidate that provision. *Williams* v. *Zbaraz*, 448 U.S. 358, 367 (1980).

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[27] The original version of Section 207 was in effect from January 12, 1983, to October 30, 1984. The appellees' decedents all died within this period (J.A. 12-14). The Department of the Interior estimates that, on a nationwide basis, in excess of 4,000 interests escheated to Indian tribes during this period of less than two years.

[28] The effect and applicability of the 1984 amendments were not briefed prior to the decision of the court of appeals because the case was submitted to that court three weeks before the passage of the amendments. In the petition for rehearing (at 7-8), the Secretary argued, inter alia, that the panel's holding with respect to the amended version of Section 207 was gratuitous because the amendment had no application to the fractional interests at issue in this case. The court of appeals nevertheless denied the petition without comment (J.S. App. 19a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

2. The Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517, 25 U.S.C. 2201 *et seq.*, is reproduced in its entirety at J.S. App. 27a-31a, and the amendments to that Act made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, are reproduced at J.S. App. 32a-36a.

a. Section 207 or the Indian Land Consolidation Act, as originally enacted and as codified at 25 U.S.C. 2206, provides:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendent [1] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

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[1] So in original. Probably should be "descend".

b. Section 207 of the Indian Land Consolidation Act, as amended by the Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(4), 98 Stat. 3172, and as codified at 25 U.S.C. (Supp. II) 2206, provides:

> (a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by

intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

3. Section 11 of the Act of Mar. 2, 1889, ch. 405, 25 Stat. 891, provides:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the

United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes." *Provided*, That the President of the United States may in any case, in his discretion, extend the period by a term not exceeding ten years; and if any lease or conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void: *Provided further*, That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered. Each of the patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

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